

Written Statement

Of

**Matthew Berry
Deputy General Counsel
Federal Communications Commission**

On

**Another Year, Another Billion Hours:
Evaluating Paperwork Reduction Efforts in the Federal Government**

**Before the
Subcommittee on Regulatory Affairs
Committee on Government Reform
U.S. House of Representatives**

July 18, 2006

Good afternoon, Chairman Miller, Ranking Member Lynch, and distinguished members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss the Federal Communications Commission's compliance with the Paperwork Reduction Act (PRA) and the FCC's efforts to do its part to reduce the information collection burdens placed by the Federal government on the American people.

The Commission is continuously looking for ways to reduce unnecessary or outdated regulations. We do so through several processes, including, but not limited to, regularly reviewing, pursuant to the Regulatory Flexibility Act, rules having a significant impact on a substantial number of small businesses, *see* 5 U.S.C. § 610, and conducting a biennial review of all regulations issued under the Communications Act that apply to the operations and activities of any provider of telecommunications service to determine whether they are no longer in the public interest as the result of meaningful economic competition between providers of telecommunications service, *see* 47 U.S.C. § 161. In this vein, the Commission also is always looking for ways to reduce unnecessary or duplicative burdens associated with existing information collections. For example, since the beginning of Fiscal Year 2006, the FCC has already discontinued or consolidated a total of 16 previously-approved information collections.

In order to fulfill its statutory responsibilities, however, the FCC sometimes must impose information collection requirements, generally on the entities that it regulates. In recent years, for example, the FCC has instituted information collections as part of its efforts to implement important statutory mandates, such as improving consumers' ability to make sense of their telephone bills, giving the public the ability to block unwanted telemarketers' calls through the do-not-call list, and protecting citizens from unwanted commercial facsimile messages. The Commission has also engaged in information collections in order to fulfill the Commission's

statutory mission of “promoting the safety of life and property through the use of wire and radio communications,” such as by enhancing 911 emergency telephone call reliability.

In designing information collections, however, the Commission takes care to ensure that it does not impose unnecessary paperwork burdens on businesses or the general public. Before the FCC implements an information collection, it must comply with the Paperwork Reduction Act and obtain approval from the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB). To obtain OMB approval of a collection of information, the FCC must demonstrate that it has taken every reasonable step to ensure that the proposed collection of information is the least burdensome necessary for the proper performance of FCC functions to comply with legal requirements and achieve program objectives; is not duplicative of information otherwise accessible to it; and has practical utility. 5 C.F.R. 1320.5(d)(1).

The FCC complies with the PRA through a transparent process designed to minimize the burdens associated with information collections. Individual Bureaus and Offices within the FCC initiate all information collections. These information collections result from agency rule-making activities associated with new statutes, congressional requests for information, and other needs of the Commission and its program offices, such as the need to track communications outages following last year’s hurricanes. The Office of Managing Director’s Performance Evaluation and Records Management Division (OMD/PERM), a separate office from the initiating office, then reviews and approves all information collections before they are submitted to OIRA. OMD/PERM thoroughly scrutinizes each information collection before certifying that the collection meets PRA standards. Indeed, in recognition of the trust OIRA places in the work of OMD/PERM, the FCC is one of only two agencies in the Federal government to have

received delegated authority to internally review and approve renewals of information collections with total annual burdens of 5,000 hours or less and a burden of 500 hours or less per respondent. 5 C.F.R. Part 1320 App. A.

OMB's Fiscal Year 2006 Information Collection Budget indicates that the paperwork burden imposed by Commission regulations grew from approximately 26 million hours to approximately 145 million hours in Fiscal Year 2005, which represents an increase of approximately 456 percent. The Commission recognizes that this increase is a significant one. However, the overwhelming majority of this increase -- over 97 percent -- was the direct result of carrying out congressional mandates contained in recently enacted statutes. *See* OMB FY2006 Information Collection Budget at 45.

Specifically, information collections associated with implementation of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act) accounted for most of the increase in the paperwork burden imposed by Commission regulations during FY2005, or about 115 million hours. In fact, the CAN-SPAM regulations currently account for 72.9 percent of the FCC's total public burden hours.

Congress passed the CAN-SPAM Act to address the unwanted, and sometimes fraudulent and deceptive, electronic messages being sent by some businesses. Consumers complained, and Congress responded. While the Department of Justice and the Federal Trade Commission are primarily responsible for enforcement of the CAN-SPAM Act, the FCC was given an important role to play under the Act. The Commission's role is directed to commercial messages that are sent directly to an electronic mail address provided by a wireless carrier for delivery to a subscriber's wireless device, such as text messages sent to a wireless e-mail address. Specifically, the FCC was directed by Congress to "provide subscribers to commercial mobile

services with the ability to avoid receiving mobile service commercial messages unless the subscriber has provided express prior authorization to the sender.” 15 U.S.C. § 7712(b)(1). The FCC was also directed to “consider the ability of a sender of a commercial electronic mail message to reasonably determine that the message is a mobile service commercial message.” 15 U.S.C. § 7712(c).

All of the information collections adopted by the FCC to implement the CAN-SPAM Act were designed to minimize the paperwork burden associated with the Commission’s regulations. For example, the FCC considered one alternative that would have created a list of the e-mail addresses of those individuals who did not want to receive commercial messages sent directly to their wireless devices. The Commission concluded, however, that such a list, similar to the Do-Not-Call List, would have imposed an unnecessarily significant burden on businesses and would have significantly jeopardized the privacy of those individuals placing their e-mail addresses on the list.

In deciding how best to fulfill its congressional mandate, the FCC instead chose the option that it concluded both would be the most effective in protecting citizens from receiving unwanted commercial messages on their wireless devices and would create the least amount of paperwork. Consistent with Congress’s direction, the Commission prohibited businesses and others from sending mobile service commercial messages absent a recipient’s “express prior authorization.” The Commission determined that prior authorization could be written or oral, and required that requests for authorization include certain disclosures. See 47 C.F.R. § 64.3100(d).

In addition, because of the need for senders of these messages to distinguish between e-mail addresses associated with wireless devices covered by the Commission’s regulations and

devices that do not fall within the Commission's jurisdiction under the CAN-SPAM Act, the FCC created a list of Internet domain names associated with commercial mobile services. Two information collections were necessary to make this list effective in preventing unwanted commercial messages. First, commercial service providers are required to regularly update the Commission's list of domain names with those domain names associated with their wireless devices. And second, those sending commercial messages must regularly check that list and ensure that they do not send messages to e-mail addresses using the domain names on the Commission's list. 47 C.F.R. § 64.3100(f).

The bulk of the estimated burden of the CAN-SPAM information collections resulted from the FCC's determination that millions of businesses in the United States would seek to send mobile service commercial messages. Consequently, we estimated that millions of businesses would be burdened both by the rule requiring senders of commercial messages to obtain express prior authorization from recipients and the requirement to check the Commission's list of domain names associated with wireless devices. It is important to note, however, that these rules only impose a burden on businesses to the extent they wish to send commercial e-mail messages. If businesses do not send such messages, the Commission's regulations impose no paperwork burden on them whatsoever. Indeed, the Commission's regulations save many businesses the expense associated with the receipt of unwanted commercial e-mail messages. Furthermore, the FCC published notice of these information collections in the Federal Register twice, but no public comments were received. Even after OMB approved these information collections, no one challenged the FCC's CAN-SPAM rules in court. As a result, we believe that the substantial benefits of the Commission's CAN-SPAM regulations, coupled with the apparent lack of

concern from the business community on whom the burdens fall, support the FCC's method of implementing the statute.

I would also like to make two points concerning the Commission's burden estimate of approximately 115 million hours for the CAN-SPAM regulations. First, the FCC realizes that the estimate may be far too high because it may have significantly overstated the number of businesses that would incur burdens as a result of the Act. Not every business in the United States sends mobile service commercial messages. In fact, the Senate Report on the CAN-SPAM Act noted that mobile service commercial messages are sent more by direct marketing associations and companies than by individual businesses. Senate Report No. 108-102, at 12. At the time that the FCC's burden estimate was prepared, however, no data related to the number of entities sending commercial messages was available. This information hopefully will become available when the FTC completes its study of a proposed do-not-e-mail list, which was mandated by the CAN-SPAM Act. At that time, the FCC plans to recompute the burden estimates contained in this information collection and file a correction sheet with OMB revising the burden estimates.

Second, the CAN-SPAM information collection burden estimates were just that – estimates. In some situations, estimating the paperwork burden associated with information collections is more art than science. In this case, the FCC made its best attempt at making these estimates based on available information and the guidance on making estimates provided for information collection filings with OMB. Additionally, this task was complicated by the fact that, unlike the typical FCC information collection affecting communications companies with which the FCC is familiar, the CAN-SPAM regulations by necessity affected a much wider range of businesses. I can report that the FCC, in its experience with the PRA, has often found

that initial estimates for first-time information collections prove to be too high. One reason for this is that the actual burdens fall as affected entities become more familiar with the information collection. The CAN-SPAM information collections were approved by OMB for a three-year period – until December 31, 2007. The FCC will timely seek renewal of the information collections with a new and more informed burden estimate, which we currently believe will be significantly lower than 115 million hours.

I would also like to briefly discuss one other new Commission rulemaking triggered by congressional action that resulted in a significant increase in our overall information collection burden. Three months ago, the FCC adopted rules implementing the Junk Fax Prevention Act of 2005, which codified the established business relationship exemption from the existing prohibition forbidding any entity from sending an unsolicited advertisement to facsimile machines without express permission. See 47 U.S.C. § 227(b)(1)(C); Junk Fax Implementation Order, FCC 06-42. Three information collections resulted from this rulemaking. First, consistent with the statute, the Commission's rules require senders of facsimiles making use of the statutory exceptions to the prohibition on sending unsolicited advertisements to fax machines to provide notice and contact information to allow recipients to opt out of receiving unwanted facsimiles. 47 U.S.C. §§ 227(b)(1)(C)(iii) and 227(b)(2)(D) and 47 C.F.R. § 64.1200(a)(3)(iii). Second, as required by the statute, recipients of facsimiles are allowed to file opt-out requests that must be honored by the sender by removing the person from its facsimile advertising list. 47 U.S.C. §§ 227(b)(1)(C)(iii) and 227(b)(2)(E) and 47 C.F.R. § 64.1200(a)(3)(v). Third, senders of facsimiles, in the event of a complaint by a recipient of a facsimile, are required to show that they either had express prior permission to send facsimiles to the individual in question or, based

on records kept in the ordinary course of their business, that they had an existing business relationship with the recipient.

The Commission believes that these three information collections were necessary to carry out Congress's direction to protect Americans from receiving unwanted commercial facsimiles and were designed in such a way as to minimize the paperwork burden imposed by the Commission's regulations. As in the case of the CAM-SPAM information collections, the FCC invited public comment on the Junk Fax Prevention Act information collections, but no comments were received, and OMB approved the information collections. I note that the FCC's initial burden estimate for these information collections was almost 25 million hours annually. Our final submission to OMB, however, revised that estimate downwards to just over 13 million hours, a figure that should be reflected in next year's Information Collection Budget. I also note again that these burden hours may decline even further as the public gains actual experience with the information collections.

I would like to close by assuring the members of the Subcommittee that the FCC takes its duties and responsibilities under the PRA very seriously. Through the elimination of unnecessary information collections and the transformation of paper collections to electronic collections, we are attempting to reduce the burdens we impose on the public while at the same time fulfilling our statutory responsibilities. When we seek OMB renewal of existing information collections, we review and revise not only the collections themselves but also the burden estimates based on actual experience. And, finally, whenever we adopt new information collection, we seek to minimize the burdens placed on business and on the general public.

Thank you for the opportunity to testify before you today, and I would be pleased to answer any questions you may have.